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Harry E. Browne

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HARRY L. BROWNE*

INTRODUCTION

The National Labor Relations Board is the chief administrator of our national labor policy. The duty of the Board, under the law, is to carry out the will of Congress and give it direction. As stated by Mr. Justice Holmes, sitting as Circuit Judge in *Johnson v. United States*,[1] "[t]he legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." It has been argued, however, that the Board, in the administration of the National Labor Relations Act, has not followed Congressional intent and has exceeded its powers. Whether the NLRB has exercised powers greater than those granted by Congress and whether it has ignored the will of the Legislature were questions raised in recent hearings before the Senate Judiciary Subcommittee on Separation of Powers. It is the purpose of this article to review Board decisional doctrine in the light of congressional intent in administering our labor laws.

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* J.D., 1936, Indiana University; Partner, Spencer, Fane, Britt & Browne, Kansas City, Missouri. This article is based upon a statement before the Subcommittee on Separation of Powers of the Committee on the Judiciary of the United States Senate, April 30, 1968.

1. 163 F. 30, 32 (1908).

SCHEME OF LABOR LEGISLATION

Prior to discussing specific decisions, it might be well to review the fundamental concept on which the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act were all based. This concept is designed to insure "free collective bargaining" or, more precisely, voluntary labor contracts voluntarily negotiated, by achieving a balanced relationship between labor and management.

This principle was recognized three years before the Wagner Act, by the enactment of the Norris-LaGuardia Act of 1932, which curtailed the use of injunctions by federal courts in labor disputes in order to assure free interplay between labor, on the one hand, and management on the other. Senator Robert Wagner, author of the legislation, noted that the government was to occupy "a neutral position, lending its extraordinary power neither to those who would have labor unorganized nor to those who would have organized it. . . ."[2] The Congress, in passing the Wagner Act three years later, promoted the "practice and procedure of collective bargaining" by guaranteeing combinations of workers an equal bargaining power with employers. The Taft-Hartley Act and the Landrum-Griffin Act, reaffirming a congressional desire to retain free collective bargaining, endeavored to balance labor-management relations by curbing excessive union power. Senator Robert Taft stated in the congressional debates on the Taft-Hartley Act, "unreasonable power" leads to the exercise of power "to accomplish ends which are not reasonable," and where there is a balance of power, "neither side feels that it can make an unreasonable demand and get away with it."[3]

The Supreme Court also recognized that by "adjusting of competing interests" voluntary collective bargaining would remain the keystone of the federal scheme to promote industrial peace.[4] Labor legislation, therefore, has erected a structure to achieve equality in bargaining power so that competing interests can be fairly balanced and result in fair settlements. Congress legislated to the end that abuses be curtailed in those areas of the labor-management complex where excessive power on one side or the other might weaken free collective bargaining and thereby impinge on the public interest. Bargaining table equality, then, was the design of labor legislation.

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2. 75 CONG. REC. 4915 (1932).
3. 93 CONG. REC. 3835 (1947).
4. Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 104 (1962).

Increasing Industrial Strife

Today, traditional collective bargaining procedure is not working to the public satisfaction. Much is heard about free collective bargaining and strikes affecting the public interest, and it is indeed a matter of congressional concern. Department of Labor statistics disclose that there were more strikes called in 1967 than in any year since 1954; and it ran still higher in 1968. The prolonged strikes in 1965 and 1966 in the maritime industry and in the New York City transit system are memorable examples. A lengthy strike against New York newspapers forced one of them permanently to close its doors. The President, in his message to Congress in January, 1966, called for remedial legislation, but offered no proposed solution. Critical strikes are still occurring. A lengthy strike in the copper industry was settled after some eight months' duration. A Detroit newspaper strike lasted for months. A nation-wide telephone communication strike was only recently settled.[5]

Responsibility of NLRB

As stated above, the NLRB is charged with administering our labor policy in accord with the will of Congress. It may be seriously questioned, however, in the light of disturbing Labor Board decisions, that the Board has fulfilled its responsibility. There can be no question that the last two major pieces of federal labor legislation—Taft-Hartley and Landrum-Griffin—clearly manifest an intention on the part of Congress to restrict the previous immunity given to union activity. The Landrum-Griffin Act was the outgrowth of a hearing by the Senate Select Committee on activities in the labor field, where glaring examples of abuse of union power were presented to the committee. The attempt was to limit "blackmail" picketing where a union pickets for recognition as bargaining agent for employees, although it does not represent a majority; it restricted hot cargo agreements by which a union forces one employer to agree not to do business with another employer with whom the union may have a dispute; and it sought to eliminate secondary boycott practices which allowed unions to picket or strike neutral or secondary employers.

Recognizing that the law is indeed controversial, never "easy" or "dispassionate," and that some provisions are subtly, if not ambiguously drawn and recognizing further the integrity of Board members, yet I respectfully suggest that Board decisions in many areas have failed to follow the direction of Congress. For this reason they have unsettled the balance of power essential to sound collective bargaining and may well have contributed to indus-

5. U.S. Dept. of Labor, BLS, 91 Monthly Lab. Rev. 10, at 64, 127 (Oct. 1968).

trial strife and inflationary settlements. Since the Board appears unlikely to change its views, corrective legislation is needed if we are to maintain free collective bargaining as the cornerstore of our national labor policy.

In 1963 I reviewed NLRB decisions and concluded:

> There are those in this country who feel that our laws should be made so as to facilitate the attainment of a particular objective. If this is to be accomplished, it should be done only through changes in legislation made by Congress. It should not be done by changes in established interpretations of the law. The recent decisions of the new Board majority have done just this, and in so doing the Board's majority, we submit, has just as effectively usurped the power of Congress as if they had rewritten the provisions of the law. The precedent being set by the Board, if not halted and reversed, can only demean the Board's stature and the reliability of all administrative law.[6]

Board Decisions

Admittedly, the Board's task, considering the explosive nature of the labor-management relationship, is a difficult one. I do not here quarrel with the mine-run case, the vast majority the Board is called upon to decide, even though I might disagree on a case-by-case examination. These decisions are rational and have support in the record. My dissent lies in certain policy positions the Board has taken where the Board has strayed from congressional intent and has used its extraordinary power to shackle and even reverse directives laid down by Congress for the Board to follow. When considered as a party of the whole, the decisions appear to have canted the entire collective bargaining structure which Congress had legislated. They run from the starting point of aiding the union in its initial attempts at organization, then through Labor Board elections, to orders to bargain without an election or despite an election which the union may have lost, then to increasing the power of unions at the bargaining table and, finally, in an employer versus union test of economic strength after an impasse is reached. In this entire labor-management spectrum, the NLRB, I respectfully submit, has not carried out the will of Congress.

Questions of Representation

Prior to the Taft-Hartley Act, the Board relied on "extent of

6. *The National Labor Relations Board: Labor Law Rewritten,* 49 A.B.A.J. 64 (Jan. 1963).

union organization" as a basis for determining bargaining units. The Taft-Hartley Act changed the rule, providing in section 9(c)(5) that "the extent to which the employees have organized shall not be controlling."[7] Additionally, section 9(b) of the Act was modified to reflect the Taft-Hartley amendments which granted employees not only the right to self-organization but the concomitant right to refrain from such organization. The Board was mandated to determine the appropriate unit, not merely to assure employees "their right to self-organization and to collective bargaining," as expressed in the Wagner Act, but instead to insure employees "the fullest freedom" to exercise *all* of their rights guaranteed by the Act. Yet in *Quaker City Life Ins. Co.*,[8] the Board found fault with well-established criteria for bargaining units of insurance agents. For a period of seventeen years, the Board had consistently held that state-wide or company-wide units were appropriate for insurance agents.[9] The Board discarded the old principles on the ground that the unions had been unable to organize on such a basis, and found smaller units to be appropriate. The Board's rationale seemed to be based on extent of organization. It said: "[S]tate-wide or company-wide organization has not materialized, and the result of the rule has been to arrest the organizational development of insurance agents. . . ."[10] Similarly, in *Sav-On-Drugs, Inc.*,[11] and in *Frisch's Big Boy Ill-Mar, Inc.*,[12] the Board disregarded a retail unit embracing all stores in an administrative division of a chain or in a geographic area, and found a single-store unit or less appropriate, notwithstanding the established criteria pointed to the broader unit. In reversing the Board in *Frisch's*,[13] the court said all stores in the chain were appropriate because they were "alike . . . as peas in a pod" and it saw no basis for the Board's fragmentizing of the unit. In *Stern's, Paramus*,[14] *Arnold Constable Corp.*,[15] and *Lord & Taylor*,[16] the Board again departed from its prior policy under which store-wide units were considered the appropriate unit in the retail department stores, and now permits separate units of selling and nonselling personnel. The Board has announced it will adhere to its position on unit findings in chain stores, despite reversals by the courts of appeals. Noting the reversals, the Board, in *Haag Drug Co.*,[17] stated nevertheless

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7. Taft-Hartley Act, 61 Stat. 136 (1947).
8. 134 N.L.R.B. 960 (1961).
9. *E.g.*, Metropolitan Life Ins. Co., 56 N.L.R.B. 1635 (1944).
10. Quaker City Life Ins. Co., 134 N.L.R.B. 960, 962 (1961).
11. 138 N.L.R.B. 1032 (1962).
12. 147 N.L.R.B. 551 (1964).
13. NLRB v. Frisch's Big Boy Ill-Mar, Inc., 356 F.2d 895, 896 (7th Cir. 1965).
14. 150 N.L.R.B. 799 (1965).
15. 150 N.L.R.B. 788 (1965).
16. 150 N.L.R.B. 812 (1965).
17. 169 N.L.R.B. No. 111 (1968).

that it would "continue to adhere to the policy of finding a single-store unit presumptively appropriate until the Supreme Court rules on the issue," even though certiorari was denied in *Purity Foods*,[18] another chain store case in which the Board's unit finding was rejected by the court of appeals. The court considered congressional intent versus Board policy, and said "that there should be some minimum consideration given to the employer's side of the picture, the feasibility and the disruptive effects of piecemeal unionization. Congress's appreciation of these factors, we believe, is evidenced by its passage of section 9(c)(5) to the effect that the extent of organization is not the sole consideration."[19]

This points out a procedural defect in the statute worthy of consideration by Congress. Under the present law, despite the tremendous impact of Board decisions in the representation case area, there is no direct appeal to the reviewing courts on representation matters. A union has no right whatsoever to obtain any judicial review of such decisions. An employer can appeal, but only if the union wins the election, and then he must refuse to bargain with the union in order to get a court determination of the issues. In the *Sav-On* case[20] the company could not get a review on the critical unit issue because the union lost the election. Yet the Board still uses it as a precedent. Similarly, in the *Stern's*[21] and related cases, a test is not available since the petitioning union, once having used the Board's process to establish a far-reaching precedent adverse to employers and other unions alike, simply abandoned its organizational efforts and created a precedent which the courts cannot adjudicate under the present absence of judicial review in such a situation. Ironically, in *R.W.D.S.U. v. N.L.R.B*,[22] the court, affirming the Board, stated that since separate units of selling employees, nonselling employees, and clerical employees "have not been tested in the courts," it thereby "indicates acceptance of them by the industry."

In *Excelsior Underwear, Inc.*,[23] the Board in 1966 originated a rule by which the Board furnishes unions with the names and addresses of the employees prior to an election, although traditional methods of organizing without such assistance had been regarded as adequate since the days of the Wagner Act. It would appear

18. NLRB v. Purity Food Stores, Inc. (Sav-More Food Stores), 354 F.2d 926 (1st Cir. 1965).
19. *Id.* at 931.
20. Sav-On Drugs, Inc., 138 N.L.R.B. 1932 (1962).
21. Stern's Paramus, 150 N.L.R.B. 799 (1965).
22. 385 F.2d 301 (D.C. Cir. 1967).
23. 156 N.L.R.B. No. 111 (1966).

that the Board rule runs counter to our labor policy to have the federal government remain neutral. In a sectional analysis of Executive Order 10988, signed by President Kennedy on January 17, 1962, dealing with union organization in the federal service, the United States Civil Service Commission set forth guidelines for federal agencies. One of them is particularly pertinent:

> Q. Should a list of names and home addresses be furnished to unions for solicitation purposes?
> A. No, that would not be in keeping with the posture of neutrality management must maintain. It would be assisting the organization directly.

The Board has also promulgated a new type election notice, which, while purporting to explain election procedures, emphasizes employees' rights to organize and employer unfair labor practices, but gives considerably less emphasis to the coordinate right of employees not to join unions and union unfair labor practices.[24] This new election notice came as a complete surprise to the members of the bar practicing before the Labor Board. It was simply announced by a press release. The Board did not utilize its rule-making powers under section 6 of the Act, and there was no benefit of hearing.

Free Speech

Board decisions also restrict employers in their communications with the employees during union organization, notwithstanding that Congress in 1947 in section 8(c) adopted a free speech provision that the "expression of any views, arguments, or opinion" in any form "shall not constitute or be evidence of an unfair labor practice. . . ." In spite of section 8(c), the Board holds that communications concerning statements of fact and expressions of opinion may be unfair labor practices or grounds for upsetting an election.[25] In reversing the Board on one of these cases, the second circuit significantly noted that the "trend of Board decisions" was "towards ever increasing restrictions on employer speech."[26]

Board Orders to Bargain Without Election

Board orders now often require employers to bargain with a union without an election, a rapidly growing development which strikes at the heart of the representation procedures of the Act, since it may foist on employees a union not of their own choosing. Under a marked extension of the *Joy Silk Mills* case,[27] which involved willful and flagrant practices by an employer to undermine

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24. N.L.R.B. Press Release, Washington, D.C., Jan. 23, 1967.
25. Lord Baltimore Press, 142 N.L.R.B. 328 (1963); Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962); Trane Co., 137 N.L.R.B. 1506 (1962).
26. NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967).
27. 85 N.L.R.B. 1263 (1949).

the union's undisputed majority, the Board frequently issues orders to bargain even though the unfair labor practices are neither willful nor flagrant. And, the union cards are of doubtful value since they may be secured by misrepresentation or other highly questionable means. In some cases, no unfair labor practices whatsoever may have been committed, as where the employer in good faith questions the union's continued majority,[28] or where he has genuine doubt of the Act's coverage over him.[29] The Board's rule has been severely criticized by objective observers in the field;[30] yet the Board continues the practice.

In *NLRB v. River Togs*,[31] the court, reversing the Board, commented that the "[C]ongress that passed the Taft-Hartley Act would have been mighty surprised to learn" that such unreliable cards "could endow the union with the right to represent all employees and require an employer to recognize it." The court found it difficult to understand why the Board relied upon cards signed under an atmosphere of misrepresentation and coercion, which was in "sharp contrast" to election procedures where the Board requires strict "laboratory conditions" in order to assure the employees' free choice. In *Purity Food Stores*,[32] the court observed that the Board did not give as "pervasive effect to union unfair labor practices in consideration of union cards as it imposes on the company." In *NLRB v. Flomatic*,[33] the second circuit said that the remedy for alleged employer unfair labor practices was "strong medicine," for it may impose a bargaining representative on employees not of their own choosing, contrary to the purposes and policy of the Act. In a case which did not reach the courts, the trial examiner, viewing the evidence on a first-hand basis, rejected the cards because they "partake too strongly 'of the fine print' clauses in contracts. . . ," and it was not necessary for the Board to "condone chicanery" in order to effectuate the policies of the Act. In reversing, the Board said, "[I]t remains the Trial Examiner's duty to apply established Board precedent," and thus "considered the issues herein on the basis of applicable Board precedent" and

28. Laystrom Manufacturing Co., 151 N.L.R.B. 1482 (1965).
29. H & W Construction Co., 161 N.L.R.B. No. 77 (1967).
30. Lesnick, *Establishment of Bargaining Rights Without a National Labor Relations Board Election*, 65 MICH. L. REV. 851 (1967); Lewis, *The Use and Abuse of Authorization Cards in Determining Union Majority*, 16 LAB. L.J. 434 (1965); Comment, *Refusal to Recognize Charges Under Section 8(a)(5) of the NLRA: Card Checks and Employee Free Choice*, 33 U. CHI. L. REV. 386 (1966).
31. 382 F.2d 198 (9th Cir. 1967).
32. 150 N.L.R.B. 1523, *enforcement denied*, 354 F.2d 926 (1st Cir. 1965).
33. 347 F.2d 74 (2d Cir. 1965).

certified the union a representative of the employees on the basis of cards which stated in large case bold type "I WANT AN NLRB ELECTION NOW" and "Petition and Authorization for NLRB Election." Only the "fine print" stated a bargaining authorization.[34]

The fourth circuit in *Logan Packing Co.*,[35] in reversing the Board on a card-check case, said, "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees . . ." and that "no thoughtful person" would attribute reliability to them.

The Board's general practice is not to vitiate union cards unless the solicitor said that the only or sole purpose of the card was to have a Labor Board election. Many courts have frowned on this, asserting that this mechanical rule does not truly reflect the desires of the employees. The court, in *Swan Supercleaners*,[36] said that a "sophisticated and ony modestly talented union agent could easily live with such a narrow rule and, leaving out the bad words —'sole' and 'only'—employ language clearly calculated to lead a woman laundry worker to believe that the holding of an election was all that she had signed up for."

The Board emphasizes its increasing caseload and the difficulty in rendering decisions fairly and with dispatch. Yet, I believe it is fair comment to observe that much of the increased caseload is due to the new ventures of the Board in these card-check cases as well as contract interpretation cases, best left to the private parties. Unions, understanding the tendency of the Board in this direction, have filed an increasing number of 8(a)(5) cases, and they have been processed by the Board. I note, for example, in the National Labor Relations Board report for the fiscal year of 1965, there was a general overall increase of 8% in unfair labor practices. But there was a 25% increase—over three times the others—involving refusal to bargain charges against employers. The trend continues. In *Imco Container Company*,[37] for example, a case which I tried on behalf of the employer, the General Counsel issued an 8(a)(5) complaint, when the union withdrew a representation petition. It was only by the slightest good fortune, which ordinarily would have escaped the attention of a practitioner that I discovered that a substantial number of cards already introduced in evidence by the General Counsel as valid authorizations for membership were out and out forgeries. Employees who were called to the witness stand, and who were not interviewed by company counsel beforehand, testified that they had never signed the cards. Of course, the 8(a)(5) complaint was dismissed. But this required an expendi-

34. Lenz Co., 153 N.L.R.B. 1399 (1965).
35. NLRB v. Logan Packing Co., 384 F.2d 562, 565 (4th Cir. 1967).
36. Swan Supercleaners v. NLRB, 384 F.2d 609, 620 (6th Cir. 1967).
37. Imco Container Co. of Harrisonburg v. NLRB, 346 F.2d 178 (4th Cir. 1965).

ture of manpower and of money. Multiply this by the legion of cases where the Board is proceeding on 8(a)(5) cases, and substantial savings in time and in money could be made and the caseload considerably reduced.

In another case, *Crawford Manufacturing Company*,[38] the Board relied upon cards to prove majority because they found the solicitor did not expressly represent the cards to be for the "sole or only" purpose of having an election under the so-called *Cumberland Shoe*[39] doctrine. Yet, admittedly, much confusion concerning the circumstances of signing the cards reigned among the employees, and many of the employees at least believed that the cards were signed only to have an election. Yet the Board found the union had a majority, notwithstanding the union lost in a secret ballot election. The Court of Appeals for the Fourth Circuit reversed and, I respectfully submit, correctly so. Undaunted by these reversals, the Board still follows the *Cumberland*[40] line. The Board filed a petition for certiorari in *Crawford*.[41] Whatever the outcome of the case, however, there has been an abuse of these authorization procedures contrary to congressional intent. This is true because of the Taft-Hartley amendments, the Wagner Act provision, which provided that the Board could use "any other suitable method to ascertain such representatives" in addition to the secret ballot, was deleted. While it is true that this pertained to the Section 9 representation procedures of the Act, it manifested an intention on the part of Congress that the secret ballot was the best method of ascertaining the employees' desires. The Board's practice is surely contrary to the direction Congress sought to give this crucial matter.

Another recent decision[42] illustrates the Board tendency. Section 9(b)(2), which was a new provision under the Taft-Hartley Act, provided that "no election shall be conducted in any unit within which in the preceding 12-month period a valid election has been held." The idea was to have a period of grace and to stabilize labor relations once the employees had demonstrated they did not want a union as bargaining representative. Yet, in *Conren, Inc.*,[43] two unions participated in an election, and both lost. Within the year, one of them obtained a majority of cards. Despite the stat-

38. Crawford Mfg. Co., Inc. v. NLRB, 386 F.2d 367 (4th Cir. 1967).
39. 144 N.L.R.B. 1268 (1963).
40. *Id.*
41. Crawford Mfg. Co., Inc. v. NLRB, 386 F.2d 367 (4th Cir. 1967).
42. Conren, Inc. v. NLRB, 368 F.2d 173 (7th Cir. 1966).
43. *Id.*

ute, the Board held that the company violated the Act by refusing to bargain with the union. The construction of the statutory one year rule may be contrasted with the rule imposed by Board decision that certifications are presumptively valid for at least one year without challenge, and even longer in the absence of "objective considerations" that the union no longer represents a majority. And sometimes, as we have noted, as in *Laystrom*,[44] these "objective considerations" are fairly difficult to prove before the Board.

Picketing and Strikes

The history of labor legislation, since the Wagner Act, has demonstrated an attempt by Congress to assure employees the opportunity of an uncoerced freedom of choice in the selection or rejection of a collective bargaining representative. To that end, the Wagner Act sought to protect them from various employer impingements on the expression of the majority will; the Taft-Hartley amendments reflected Congress' awareness that union pressures also frustrated that will.

In the area of unions' organizational and recognitional picketing, however, the means provided by the Taft-Hartley amendments were demonstrably inadequate to achieve this objective. The sole provision of Taft-Hartley which was designed to limit organization picketing was section 8(b)(4)(C). According to that section, a union was free to engage in such picketing so long as the picketed employer was not then obligated to deal with another certified union. In all other cases, the unions' unlimited right to picket created a situation where the employers' response might depend alone on its ability to survive. Whether the union represented a majority of the employer's employees and, indeed, those employees' interests generally, could be only ancillary factors to the employer.

Faced on the one hand with these considerations, and on the other, with unions' right to the protection of first amendment guarantees and industry gains already made, the Congress sought, in the 1959 amendments giving rise to section 8(b)(7), to effect a workable compromise.

The scheme of that compromise focuses on the National Labor Relations Board's election procedure. In general, in subsections 8(b)(7)(A) and (B), organizational and recognitional picketing are proscribed where elections either had been held and where they could not be held. Pursuant to subsection (C), subject to a first amendment publicity proviso, a union may avoid a finding that its picketing is unlawful when it files a timely petition for an election. And an employer may curtail the duration of a union's picketing by filing such a petition and a charge himself. Consistently, the Board's rules provide for the holding of an expedited election when

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44. Laystrom Manufacturing Co., 151 N.L.R.B. 1482 (1965).

such a petition is filed.[45]

Efforts to understand the various parts and interrelationships of this complex section have given rise to acknowledged confusion.[46] Unfortunately, legislative history is of relatively little help. After its review of the debates, the ninth circuit was led to conclude that they were largely inconclusive and that they were made ". . . by a comparatively small number of members of each House who were actively promoting clashing points of view . . . [the legislative record] gives no weight to the views of a large majority who made no speeches but voted."[47]

There are, however, two ideas which permeate this statutory scheme and which are derivable from the objectives which 8(b)(7) sought to achieve, from the inherent logic of its components, and from legislators' comments. These are (1) an intention to limit picketing as a destructive form of union self-help where the Board can provide a workable alternative; and (2) the creation of Board election machinery which will constitute the substitute for that self-help. Representative Barden's remarks on the expedited election proviso illustrate this dual objective. That proviso's purpose was "to enable an employer or the employees to obtain a prompt election instead of having to go through an indefinite and prolonged period of picket-line warfare, which could have the effect of placing the employer's business and the jobs of his employees in jeopardy."[48]

That this duality of purpose reflected Congress' design for section 8(b)(7) was explicitly acknowledged by the Board: "[T]he underlying statutory scheme . . . is to resolve disputed

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45. Rules and Regulations, Series 8, as amended, 102-73 *et seq.*

46. After enactment of this Section, John H. Fanning, a Board member, remarked: "Seldom has legislation packed so many apparent close and difficult questions in a small amount of type." Speech before the New Orleans Federal Bar Association, October 19, 1959. After nearly a year of experience with this legislation, another Board member, Joseph A. Jenkins, concurred: "A mere examination of the language of that statute would cause anyone, layman or lawyer alike, to realize that there are a multitude of questions which can be and are being raised regarding its application and interpretation." Speech before Federal Bar Association Annual Convention, September, 1960.

Reaction of the courts has been similar. In McLeod v. HREU, Local 89, 280 F.2d 760 (2d Cir. 1960), for example, that court noted, "the confusing and somewhat self-defeating provisions of the Section"; another commented that it "presents a number of problems not readily solved by a reading of the 1959 Act." McLeod v. Local 239, I.B.T., 179 F. Supp. 481 (D.C.N.Y. 1960).

47. Barker Bros. v. NLRB, 328 F.2d 431, 437 (9th Cir. 1964).

48. 2 LEGISLATIVE HISTORY 1813.

issues of majority status, whenever possible, by the machinery of a Board election."[49]

The question arises with respect to section 8(b)(7), whether the Board's decisions and procedures promote Congress' general desire to maximize the effective use of the Board's election machinery in organization-recognitional picketing cases.

I conclude that the Board has not done so. The Board has carved unnecessary exceptions to situations in which picketing might have been proscribed and elections held, and has permitted its election process to become so drawn out as to lose the protection against destructive self-help it was designed to be.

1. A union engaged in organizational picketing may avoid a finding that it violates the Act if it files an election petition "within a reasonable period of time not to exceed thirty days from the commencement of such picketing." One implication of this language is that a period of less than thirty days is envisioned as "reasonable" for the usual case. A review of the legislative history supports this view; otherwise, Congress must be held to have intended the logical inconsistency that the usual case and the extraordinary case must be treated alike.[50] Yet the Board has refused to require petitions to be filed in less than thirty days except in those situations in which picketing has been marked by violence, coercion, threats and other serious misconduct.[51] Accordingly, in other situations and irrespective of the industry, the effect of picketing both on the employer's ability to survive and on the employees' right to an uncoerced free choice, are ignored byproducts of the Board's practice to interpret "reasonable period" to constitute precisely thirty days.

The extent to which this practice has subverted Congress' intention appears not merely from a reading of the text itself. The testimony of then Secretary of Labor Mitchell on the interpretation to be accorded to the words "reasonable period" reveals that the definition of this period was to be flexible depending upon the extent of harm which the picketing inflicts on the particular employer's business.[52] This is a factor which the Board has consistently ignored.

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49. Blinne Construction Co., 135 N.L.R.B. 1153 (1962).

50. Representative Griffin gave the following interpretation of this language: "Of course, the picketing may be enjoined in less than thirty days if the Board finds the circumstances are such as to make it unreasonable to permit it to continue and it must be stopped at the end of thirty days." 2 LEGISLATIVE HISTORY 1812; NLRB v. Local 239, I.B.T., 389 F.2d 41 (2d Cir. 1961).

51. Cuneo v. Shoe Workers, 181 F. Supp. 324 (D.C.N.J. 1960) (holding a ten day period unreasonable delay); District 65, Retail Wholesale & Department Store Union, 141 N.L.R.B. 991 (1963) (holding twenty-six days to constitute an unreasonable period).

52. For example, picketing a small-store owner, whose livelihood depends on the daily receipts of merchandise and the daily outgo of merchandise, a reasonable time for picketing there might be a

2. In addition to fostering needless delays in the filing of election petitions, the procedures which the Board has adopted for the disposition of these petitions has virtually destroyed their use as a substitute for "prolonged picket-line warfare."[53]

When a picketing union files an election petition, it may thus forestall the filing of an 8(b)(7) charge by the picketed employer. In the absence of such a charge, no expedited election is held. Accordingly, the usual machinery of section 9 of the Act comes into play, including the necessity to establish an interest showing by the union; the right to litigate disputed unit and other issues in a hearing, whether raised genuinely or frivolously; the right to file objections after the election, and the right to appeal their resolution. Throughout this period, the union is privileged to continue picketing. This result is a specific and unnecessary Board creation. For example, the usual election rule under section 9(c)(3) provides that no election may be held for twelve months from *the date of a valid election.* The twelve-month rule appearing in section 8(b)(7)(B) is not, in terms, inconsistent. Nonetheless, the Board has determined that for purposes of 8(b)(7)(B), the twelve-month limitation period on picketing shall commence not from the date of the election, but from the date of the Board's ultimate certification of the results of such an election, thus lengthening the period during which such picketing may be conducted.[54]

The union may, at its option, cause even additional delay. Should the union file unfair labor practice charges against the picketed employer, it would serve to block the election. The petition is then held in abeyance while the charges are investigated. Picketing may continue during investigation. If the charges are deemed to have merit, the petition continues to be held in abeyance while picketing continues. If the charges are dismissed, the processing of the petition resumes, permitting the union to employ the delaying tactics described above. Still, the picketing continues.

Moreover, the Board has determined that when a union files meritorious refusal-to-bargain charges against an employer, it is

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very short one because the very life of the business is involved in the activity of the pickets.

On the other hand, picketing of a factory in the outskirts of the city which does not receive merchandise very often or does not ship it very often, the length of time—the reasonable length of time might be longer.

Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 86th Cong., 1st Sess., 315 (1946).

53. These procedures were set out in detail by the Board in its second decision in Blinne Construction Co., 135 N.L.R.B. 1153 (1962).

54. Irvins, Inc. (Local 392, Retail Clerks), 134 N.L.R.B. 686 (1961).

excused from filing any petition at all, notwithstanding that it was engaged in organizational picketing. The result was reached over the strongest dissent by Board members Leedom and Rogers, who found in it an unauthorized departure from congressional purpose constituting still another instance whereunder organizational picketing is protected at the expense of effective and expeditious use of the Board's election machinery.[55] While at least one district court has approved the majority's result, such approval was based on the belief that it was an acceptable exercise of discretion.[56] Presumably, the adoption of the minority view would also have been acceptable. While either result would be legally permissible, the issue of wisdom and policy was, at best, left open for argument.

3. In addition to the procedural roadblocks Board decisions have placed in the way of the effective use of its election processes, the Board has added certain substantive ones. The problem stems from the effect to be given the second proviso to section 8(b)(7)(C), the so-called publicity proviso, which exempts picketing whose "purpose" is truthful publicity concerning an employer's nonunion status or the absence of a labor contract, from the proscription against picketing whose "object" is recognitional.

The specific issues presented are: (1) whether picketing to protest an employer's substandard conditions or his alleged unfair labor practices falls within the general proscription against organizational picketing; and (2) whether picketing which protests an employer's non-union status or the absence of a collective bargaining agreement, but which also has an organizational object, falls within the proviso permitting publicity picketing or into the proscription prohibiting organizational picketing.

In the first *Calumet Contractors* decision,[57] the Board sought to come to grips with the first of these issues. It held that when a union picketed to publicize substandard conditions of an employer then recognizing another certified union, such picketing had a recognitional or bargaining objective within the meaning of section 8(b)(4)(C). Similarly, in *Lewis Food Co.*,[58] the Board held that picketing to compel reinstatement of a discriminatorily discharged employee, where another union had been certified, also violated section 8(b)(4)(C) as "necessarily" having a recognitional object. The significance of these decisions is that they appear to hold that when a union pickets to achieve some end customarily associated with what a representative bargains or grieves about—whether relating to substandard conditions or alleged unfair labor practices—they thereby seek to achieve a recognitional or bargaining objective.

When Congress enacted section 8(b)(7), which in effect ex-

55. Blinne Construction Co., 135 N.L.R.B. 1153 (1962).
56. Robert P. Scott, Inc. v. Rothman, 46 L.R.R.M. 2793 (D.D.C. 1960).
57. 130 N.L.R.B. 78 (1961).
58. 115 N.L.R.B. 890 (1956).

panded 8(b) (4) (C), it presumably was aware of these decisions and having failed to state any disagreement with them, may fairly be said to have intended to impart them into 8(b) (7).

Accordingly, the trial examiner, in *Claude Everett Construction Co.*,[59] held that when a union picketed to protest substandard wages and threatened to continue to picket until prevailing wage rates were paid, this constituted recognitional or bargaining picketing, citing *Calumet Contractors.*[60] In the absence of a timely petition filed by the union, a violation of 8(b)(7)(C) was found.

However, a newly constituted Board, with a different *policy* perspective, denied the logic of these decisions and revised the law. In quick succession, the Board reversed *Calumet Contractors*,[61] reversed the holding of *Lewis*,[62] rendered its *Claude Everett* decision,[63] reversing the trial examiner, and decided that picketing solely to publicize an employer's unfair labor practices had no recognitional object.[64] The last holding is particularly suspect inasmuch as the bill passed by the Senate prior to the final enactment of 8(b)(7) contained a proposal that any employer unfair labor practice would constitute a defense to a union's charged violation of 8(b)(7). This proposal was rejected, giving rise at least to the inference that a union's picketing to "inform" that the picketed employer violated the Act was understood and intended by Congress to constitute organizational picketing.[65]

The significance of these charges is that picketing which had been considered to have an *inherently* recognitional object now is no longer so considered. In the absence of *other* evidence tending to establish a recognitional object, such picketing is beyond the reach of any 8(b)(7) sanctions. Hence, the Board in the exercise of its prerogative to change its mind, changed it in the direction of reducing the effectiveness of 8(b)(7) to restrict picketing and encourage resort to the Board's election machinery.

With respect to the second issue, the Board has again engaged in a process of mind-changing which has yielded similar results in reducing the effectiveness of 8(b)(7). As noted before, this issue relates to picketing which has a dual purpose, one of which is per-

59. 136 N.L.R.B. 321 (1962).
60. 130 N.L.R.B. 78 (1961).
61. Calumet Contractors Assoc., 133 N.L.R.B. 512 (1961).
62. Farrelli Ford Sales, 133 N.L.R.B. 1468 (1961).
63. 136 N.L.R.B. 321 (1962).
64. Blinne Construction Co., 135 N.L.R.B. 1153 (1962).
65. 1 LEGISLATIVE HISTORY 584.

mitted in the publicity proviso while the other is prohibited in the section's general reference to organizational picketing.

In the first *Crown Cafeteria* decision,[66] the Board majority held that such "dual-purpose" picketing was unlawful. All that was permitted, the majority held, was picketing that had the *sole* purpose of advising the public, without other evidence of recognitional object.

After a change in Board membership, this interpretation was reversed on reconsideration. In the second *Crown* decision,[67] all members apparently agreed that a union engaging in informational picketing normally had an objective of obtaining recognition ultimately and that such picketing was within the protection of the proviso, despite this *ultimate* objective.

The split between the majority and minority concerned the situation where the picket signs and the manner of picketing conform to the provisio but there is independent evidence that the union also had a *present* objective of obtaining recognition.

In the view of the Board minority, the picketing lost the protection of the proviso when there was other evidence that the union was seeking to organize the employees or achieve recognition. The majority, however, saw no basis for distinction between an assumed objective of ultimately obtaining recognition and direct evidence of a recognition objective. In either case, the Board held that the proviso protected picketing that also had the purpose of informing the public. Indeed, in the majority's view: "We might well concede that in the long view all union activity, including strikes and picketing, has the ultimate economic objective of organization and bargaining."

Thus, the Board succeeded in contracting the scope of 8(b)(7) and increased unions' right to picket to obtain recognition, all in conflict with Congress' purpose in enacting that section. While the view of the Board majority received the approval of an appellate court,[68] it was rejected by Congressmen Landrum and Griffin as being antithetical to the intent of Congress.[69]

Pursuant to the approach of the Board majority in *Crown*,[70] the principal difficulty in dual-purpose picketing cases is to determine if the purpose is really "dual;" that is, whether the picketing

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66. 130 N.L.R.B. 570 (1961).
67. Crown Cafeteria, 135 N.L.R.B. 1183 (1962).
68. Smitley d/b/a Crown Cafeteria v. NLRB, 327 F.2d 251 (9th Cir. 1964).
69. The extent to which this is true is reflected in the fact that on April 10, 1962, Congressmen Landrum and Griffin addressed the House of Representatives and stated, in part: "The pattern of recent decisions by the NLRB gives rise to a serious concern that policies laid down by Congress in the Taft-Hartley and Landrum-Griffin Acts, are being distorted and frustrated, to say the very least." 108 CONG. REC. 5699-5700 (1962).
70. Crown Cafeteria, 135 N.L.R.B. 1183 (1962).

is "for the purpose of truthfully advising the public" within the meaning of the proviso, or whether such an alleged purpose is merely sham to mask a recognitional object. Picketing that purports to be informational is not protected by the proviso if the union *in fact* does not have a purpose of advising the public. In ascertaining the union's tactical purposes, a distinction between these two categories of picketing has been made:

Signal picketing, where the union's purpose is to use the picket line as a signal to obtain organized economic action backed by union discipline, thereby halting pick-ups, deliveries and other service by neutrals.

True publicity picketing, which appeals only to employees of the primary employer and to the unorganized public for spontaneous popular support.

Using this distinction, it has been held that signal picketing is not protected by the proviso and is unlawful if it has recognition or organization as an object. True publicity picketing is protected, however, unless it actually interferes with deliveries or communicates more than the limited information expressly permitted by the proviso, notwithstanding the pressure of an organizational object.[71]

Illustrative of the manner in which this distinction does, or does not, operate, are the so-called area-standards picketing cases. In its decision in *Claude Everett Construction Co.*,[72] the Board held that no violation of 8(b)(7)(C) had occurred because the union was picketing, according to the legend on its sign, to protest "substandard wages and conditions being paid on this job by the Claude Everett Company." It found that the union's objective was to induce the company to raise its wage scale to that prevailing in that area, and thus the picketing was protected notwithstanding its interference with pick-ups and deliveries on the project.

In *Texarkana Construction Co.*,[73] before picketing, the union asked the employer whether "union men" were to be employed on the project. Receiving a negative answer, the union commenced picketing with signs stating that the employer was not "paying prevailing wage rate." The employer was in fact paying wages lower than the ratio determined under the Davis-Bacon Act, and lower than the picketing union's scale. The Board brushed aside

71. This approach has received Board and court approval. Smitley d/b/a Crown Cafeteria v. NLRB, 327 F.2d 251 (9th Cir. 1964); NLRB v. Local 3, IBEW, 317 F.2d 193 (2d Cir. 1963); Electrical Workers Union, 144 N.L.R.B. 5 (1963).
72. 136 N.L.R.B. 321 (1962).
73. 138 N.L.R.B. 102 (1962).

the union's initial inquiry regarding the hiring of union men and held that the union's picketing was not for organization or representation purposes. In *Keith Riggs Plumbing and Heating Contractor*,[74] picketing was held to be a legitimate protest of substandard conditions, notwithstanding the fact that the union solicited membership from the employer's employees several weeks before the picketing began and several of the employees joined the union after the picketing began. Picketing remained lawful according to the Board, although (1) several employees joined the union after the picketing began, and (2) the union business agent mentioned the advantages of union membership in discussing other topics with an employee. These incidents did not establish that the union's real objective was organizational, held the Board, so that the picketing was and remained informational in nature, hence exempt from the proscription of 8(b)(7).[75]

An analysis of the Board's handling of 8(b)(7)(C) and its publicity proviso yields the following judgments. The congressional debates leading to the passage of 8(b)(7) failed to disavow existing Board authority which held that a union engages in recognitional picketing when it attempts to achieve through picketing what is otherwise the function of a bargaining representative. This failure most strongly implied that Congress intended 8(b)(7) to reflect that view. Post-passage Board precedent holding such picketing to be merely informational in nature, contravenes Congress' intent. The Board's approach is really quite artificial since any unorganized employer which is picketed, whether the picketing be labeled informational, area-standards, or whatever, believes that the union's object is organizational. Such employer's decision and its employees' decision is governed by that belief. Moreover, to perpetuate a distinction between information and organization-recognitional picketing, encourages unions to engage in verbal sham; picket signs and conversations may be tailored to satisfy the distinction while, in fact, all parties behave as if the organizational object is explicit. Unfortunately, the Board has tended to encourage these fictions. As an analysis of such cases as *Texarkana*,[76] and *Keith Riggs*,[77] reveals, the Board has exhibited some tendency to avoid finding the existence of a recognitional object despite independent evidence of such an object, by according undue weight to the self-serving terms of unions' picket signs. Therefore, instead of moving the parties closer to an election as the method by which representational decisions are to be made, the Board's rule-changing has moved them farther apart.

This conclusion is particularly apt in connection with the

74. 137 N.L.R.B. 1125 (1962).
75. *Id.*
76. Texarkana Construction Co., 138 N.L.R.B. 102 (1962).
77. Keith Riggs Plumbing and Heating Contractor, 137 N.L.R.B. 1125 (1962).

Board's revised treatment of area-standards picketing. To pretend that such picketing is not inherently organizational, and hence outside the reach of 8(b)(7), gives rise to two undesirable results. First, it induces unorganized employers to recognize picketing unions because they are subject to economic pressures without an opportunity to file meritorious 8(b)(7) charges and obtain expedited elections. Second, where the picketed employer is already recognized, it results in a situation where represented employees' working conditions are affected or established by a union other than their own. Finally, the distinction between signal and publicity picketing, as a means for determining a union's true object, is similarly suspect. Whether a union appeals to consumers or to other union members may only relate to which approach it believes to be more efficacious in achieving its recognitional object. In any event, the effect on the picketed employer is the same, whatever the pressure's source.

These decisions have a great impact, and tend to create, not reduce, industrial strife, which is the purpose of the legislation. For example, in 1967, List & Clark Construction Company, a building contractor in the Kansas City area, was engaged in building a dam and reservoir for the U.S. Corps of Engineers near Albuquerque, New Mexico. The union, which later events showed represented only three of some 27 workers, picketed for recognition. When the contractor refused, the union extended the picketing to other construction projects essential to the public welfare at Perry Kansas, Ellwood, Kansas, and Stockton, Missouri, where the employer had labor contracts with other unions who refused to cross the picket line. The company immediately filed a representation proceeding with the Board to have an expedited election, which the Act requires. Section 8(b)(7)(C) plainly provides that when a petition has been filed in recognition picketing cases—and there was no question but that this was involved here—the Board "shall forthwith . . . direct an election. . . ." Yet it was over two months before the Board held an election, and in the meantime essential public work projects came to a halt. The delay was caused in part by the filing of ungrounded unfair labor practice charges against the employer (28-CA-1534), and, as stated above, the Board would not proceed. This was unlawful recognition picketing. The work was essential to the public interest, but it was stopped. The employer was damaged by well over $100,000, and the employees lost hundreds of thousands of dollars in wages. This is the type of thing I am talking about, and these decisions hurt at the grassroots level. Who would deny that Congress intended to foreclose this? The

answer is self-evident.[78]

While I was not in the case, I am advised that in a matter involving Sears, a union, the ILGWU, attempted to organize Sears Fashion Center in North Bergen, New Jersey. These organizational efforts continued for about two or three months, at which time the union started picketing. The company filed 8(b)(7)(C) charges on February 10. The union then filed unfair labor practice charges against the company and claimed that the picketing was for that purpose. The attorney for the union also filed a so-called disclaimer, asserting that the picketing did not have an organizational or recognition objective. This, under Board rules, insulated the union from the 8(b)(7)(C) proscriptions, and the 8(b)(7)(C) charge was dismissed.[79] While there is serious doubt that in the circumstances the disclaimer was bona fide, it gave the union the latitude it needed, and it extended the picketing to 108 additional locations. The unfair labor practice charges against the company were dismissed, yet it was for that asserted reason that picketing was allowed from just a few days to up to nine months in 108 different locations. Sears was able to stand firm. I question how many other employers would be able to do so.

Co-determination

Once the bargaining relationship has been established, the pattern of Board decisions reappears in a doctrine which allows the union a voice in decision-making on issues that had always been regarded within the authority of management. The principle of co-determination, first enunciated in *Town & Country Manufacturing Co.*[80] and *Fibreboard Paper Products Co.*,[81] which required prior bargaining on an economic decision to subcontract, has since been extended to encompass decisions to automate certain operations and terminate others, and to close a plant and cease business.[82] Note that this requires bargaining on the *decision itself*, not just the *effects* of the decision on the employees, a matter more properly within the union's area of interest.

Board decisions may influence or even compel acceptance of

78. *Hearing on H.R. 11725 Before the Special Subcommittee on Labor of the Committee on Education and Labor*, 90th Cong., 1st Sess. 386 (1967).

79. *Statement Before the Subcommittee on Separation of Powers, Committee on the Judiciary*, U.S. Senate (May 31, 1968) (statement of Gerard C. Smetanal).

80. 136 N.L.R.B. 1022 (1962).

81. 138 N.L.R.B. 550 (1962).

82. Ozark Trailers, Inc., 161 N.L.R.B. No. 48 (1966); William J. Burn's Int'l Detective Agency Inc., 148 N.L.R.B. 1267 (1964), *modified*, NLRB v. William J. Burn's Int'l Detective Agency, Inc., 346 F.2d 897 (8th Cir. 1965); Royal Plating & Polishing Co., 148 N.L.R.B. 545 (1964), *reconsidered*, 152 N.L.R.B. 619 (1965), *enforcement denied and remanded*, NLRB v. Royal Plating & Polishing Co., 350 F.2d 191 (3d Cir. 1965); Renton News Record, 136 N.L.R.B. 1294 (1962).

substantive provisions of a contract, despite statutory provisions that the duty to bargain "does not compel either party to agree to a proposal or require the making of a concession," expressly adopted by Congress to prevent the Board "from determining the merits of the positions of the parties."[83] Yet the Board may regard the rejection of union demands by an employer as evidence of bad faith in not reaching agreement,[84] and it has, indeed, ordered a union dues check-off provision incorporated in a labor contract.[85] The doctrine of co-determination will unquestionably make our industry less sufficient and less competitive in the markets of the world.

Strikes and Lockout After Impasse

One other phase of Board doctrine illustrates, I believe, the tendency to both disregard congressional policy and unsettle the bargaining balance in the critical area where the assertion of power can be most effective, where an impasse has been reached and each party exerts all available economic weapons in pursuit of its bargaining objectives. What are the views of the several courts on whether the policies of Congress are carried out? In the *John Brown Food* case,[86] one of five retail food operators in a multi-employer bargaining unit was struck. In keeping with a right which long had been recognized by the Supreme Court in *Buffalo Linen Supply*,[87] the other employers locked out for a defensive reason, to prevent the union's whipsawing tactic, a tactic employed to divide and conquer each employer successively. The Board, however, held that the lockout was illegal on the grounds that the struck employer was operating with temporary help. On appeal, the tenth circuit[88] denied enforcement, noting that the Board should not "choose sides," and that it was not "common sense" to require an employer to "aid and abet" the success of the whipsaw strike. It concluded that were this principle announced by the Board to prevail, the right of the lockout which the Supreme Court had declared lawful would be rendered "largely illusory." On appeal, the Supreme Court affirmed, admonishing the Board that "the Act does not constitute the Board as an arbiter of the sort of

83. H. R. Rep. No. 510, 80th Cong., 1st Sess. 34 (1947).
84. Fitzgerald Mills Corp., 133 N.L.R.B. 877 (1961).
85. Roanoke Iron & Bridge Works, Inc., 160 N.L.R.B. No. 17 (1967).
86. 137 N.L.R.B. 73 (1962).
87. NLRB v. Truckdrivers Local 449, International Brotherhood of Teamsters, etc. (Buffalo Linen Supply Company), 353 U.S. 87, *aff'g* 109 N.L.R.B. 447 (1954).
88. NLRB v. Brown, 319 F.2d 7 (10th Cir. 1964).

economic weapons the parties can use in seeking to gain acceptance of the bargaining demands."[89] Again, in *American Ship Building*,[90] the Board held a company lockout was illegal. Reversing, the Supreme Court declared that the Board "construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." It stated that the "role assumed by the Board in this area is fundamentally inconsistent with the structure of the Act. . . ."[91]

In *Hawaii Meat Co.*[92] and *Robert S. Abbott Publishing Co.*,[93] the Board found that employers engaged in illegal practices when they subcontracted their work to maintain business during an economic strike without first notifying or consulting the union. This was an extension, of course, of the Board's *Fibreboard* doctrine.[94] The ninth circuit and the seventh circuit reversed. In reversing, the court in *Abbott* said that it would be "a startling doctrine indeed . . . to tell companies and employers faced with extinction because of a strike that before they can make economic business decisions to contract out work in order to continue operations they must first consult the union that caused the threat of extinction."[95]

Despite the judicial pronouncement in *American Ship Building*[96] and the admonition of the Court that the Board has no "authority to define national labor policy by balancing the competing interests of labor and management," the Board still undertakes to do so, and without an even hand. One example of this dualism can be found by comparing *David Friedland Painting Co.*[97] with *Television & Radio Artists*.[98] In *David Friedland*, an employer in the construction business, who operated in the territorial jurisdiction of one local union, locked out his employees in another area who were members of a sister local that was on strike against an employer association in that area and where the company also performed work. He clearly had an economic interest in the outcome of these negotiatons. The Board held that the lockout was unlawful and said that the employer simply had a "collateral or indirect interest in the labor dispute," and that it did not serve as "sufficient justification for a lockout. . . ."[99] The Board stated that it was immaterial that the employer was "affected economically

89. NLRB v. Brown, 380 U.S. 278, 283 (1965).
90. 142 N.L.R.B. 173 (1963), *aff'd*, 331 F.2d 839 (D.C. Cir. 1964), *rev.* 380 U.S. 300 (1965).
91. 380 U.S. 300, 315, 316, 318 (1965).
92. 321 F.2d 397 (9th Cir. 1963).
93. 331 F.2d 209 (7th Cir. 1964).
94. Fibreboard Paper Products Co., 138 N.L.R.B. 550 (1962).
95. Robert S. Abbott Publishing Co., 331 F.2d 209, 213 (7th Cir. 1964).
96. American Ship Building, 142 N.L.R.B. 173 (1963), *aff'd*, 331 F.2d 839 (D.C. Cir. 1964), *rev.* 380 U.S. 300 (1965).
97. 158 N.L.R.B. 571 (1966).
98. 160 N.L.R.B. 241 (1966).
99. David Friedland Painting Co., 158 N.L.R.B. 571, 578 (1966).

by the outcome of the negotiations between the union and another employer association," even though he operated in the territorial jurisdiction of the association. In contrast, in *Television & Radio Artists*, decided by the Board about two months later and where the "shoe was on the other foot," the Board accommodated the union conduct in approving what was otherwise an illegal demand for a hot cargo agreement affecting other unions. The Board said that it was in the "union's interest" to protect the "standards" of another union in another area. In approving the union's bargaining position, the Board said: "The fact that the [union] representative admitted that the union also desired to protect the wage standards of union members not working for [the employer] does not by itself affect the lawfulness of such conduct. . . . Whenever a union also represents other units of employees," it has an interest in "protecting the wage standards of such other employees."[100] The rationale of the two decisions cannot be squared. The language of the court in *NLRB v. Dorsey Trailers*[101] comes to mind:

> The Board is no 'Pooh Bah' to loose and bind at will. Congress made it an agency not as a labor board—created to aid labor in its struggle against the employer. As shown by its name, Congress created it to be a board concerned with the administration of 'labor relations' in which the rights of the employer are to be as jealously guarded as those of the employee. We repeat Judge Learned Hand's gustatory comment that the Board should be vigilant to see that what was sauce for the goose under the Wagner Act is now sauce for the gander under the Taft-Hartley Act.[102]

Again, these decisions hurt at the "grassroots" level, especially so in the construction industry, where these decisions apply and where collective bargaining has failed dramatically. For example, in the Kansas City area a plumbers and pipefitters strike of ten weeks' duration was settled the first part of August, 1967, with wage increases totaling 33 per cent. The settlement was unreasonable and inflationary, but it was dictated by the monopoly power which the union exercised over the supply of labor. This increase will have a chain reaction in all of the construction industry, and the increase will finally be passed on to the ultimate consumer. Although the employers resisted, the resistance was futile, and there was no other effective resistance on behalf of the public who must pay the bill. The situation is even worse elsewhere. In the

100. Television & Radio Artists, 160 N.L.R.B. 241 (1966).
101. 179 F.3d 589 (5th Cir. 1950).
102. *Id.* at 592.

construction industry, settlements have been inflationary and out of all reason.

Union Rights v. Employee Rights

Board decisions, however, involve more than the relationship between management *vis-a-vis* unions. They also involve decisions relating to union control over its members. In this area, the Board, when confronted with a choice between union power *vis-a-vis* individual rights, appears to side with the former. The Board has freed unions from liability for fining employees who exceed union prescribed production quotas[103] and who may cross picket lines in order to go to work in violation of union policy.[104] They have permitted expulsions from membership of employees who utilize provisions of the Act for filing a decertification petition with the Board[105] or who seek a union shop de-authorization.[106]

Another "grassroots" example is the *WDAF-TV (Taft Broadcasting Company)*[107] case in which AFTRA called a strike against the TV station in Kansas City in December, 1965. Six employees wanted to resign from the union and work. They turned in their resignations, but the union rejected them. Then, when the employees crossed the picket line, the union in early January, 1966, fined them in sums ranging from $10,000 to $20,000 each, aggregating a total of $94,000. What a potent weapon against the exercise of their section 7 rights! Unfair labor practice charges were filed by the company on behalf of these employees on July 6, 1966, but the Regional Director dismissed. His action was sustained by the General Counsel, citing the *Allis Chalmers*[108] decision for authority. I am satisfied that the union's conduct was an unfair labor practice, even assuming the validity of the *Allis Chalmers*[109] doctrine, since the employees, first, resigned from the union and should have been regarded as free agents, and, second, the fines were not reasonable. Yet the General Counsel refused to proceed, and there is no appeal from his decision under established law. Something is wrong somewhere. The General Counsel is as capable and dedicated a man as I know, and a man whom I personally greatly admire. He himself has admitted that it is part of the functions of the office to "explicate unsettled areas of the law [and] explore the proper limits of the statute." At the very least, this was such a case, and I urged it on him. Yet we got no action—and somehow these employees have the feeling they were let down. Something is wrong with the structure

103. Wisconsin Motors Corp., 145 N.L.R.B. 1097 (1964).
104. Allis Chalmers Mfg. Co., 149 N.L.R.B. 67 (1964).
105. Tawas Tube Products, Inc., 151 N.L.R.B. 46 (1965).
106. Pittsburgh-Des Moines Steel Co., 154 N.L.R.B. 692 (1965).
107. 17-CB-476.
108. Allis Chalmers Mfg. Co., 149 N.L.R.B. 67 (1964).
109. *Id.*

somewhere. Perhaps there should be a right to appeal from a refusal to issue a complaint—not to the office of the General Counsel, but possibly to a special section in the Trial Examiner's office, or possibly to the district court who will determine "reasonable cause to believe," much like 10(j) and 10(l) proceedings, so that the Board can consider the case. The case stands as a monumental warning to employees who may choose to exercise their rights to refrain, contrary to union policy. Section 7 rights stand as a beacon to mockery. I do not think Congress intended to permit such unwarranted action when it provided in section 8(b)(1) that a labor organization had the right to "prescribe its own rules with respect to the acquisition or retention of membership therein."

Broader and Mutual Remedies

Some union spokesmen have stated that, in fact, the Board is remiss in not expanding remedies to be more meaningful and effective against employers who commit violations. This was indeed the subject of inquiry in House Hearings on H.R. 11725 to increase the effectiveness of Board remedies. There is, of course, no objection to the imposition of appropriate remedies against employers who commit unfair labor practices, but in devising remedies for violations of the Act by employers the Board should be equally vigilant in devising remedies against unions who engage in violations of the law and who cause loss of wages to the individual employee. The Board has ordered back-pay against unions under section 8(b)(2) of the Act, a very narrow area, but the Board has failed to provide any remedy where employees have lost work because of an illegal picket line or an illegal secondary boycott or an illegal jurisdictional strike or an illegal strike against certification. A back-pay remedy woud be an effective deterrent to a continuation of such unlawful conduct. For example, in the List & Clark Construction Company[110] situation to which I earlier referred, the union engaged in unlawful picketing for over two months. The employees and members of other crafts wanted to work, but did not cross the picket line because they were threatened with fines. As a result, over 200 employees in Missouri and Kansas lost wages through no fault of their own. I would submit that they should have been made whole by reason of the union's unfair labor practices. An unemployed worker is no less unemployed by whoever commits the unfair labor practices, whether by the unions or employers. Mutuality of enforcement requires that all

110. See p. 239 *supra*.

be treated alike. The Board, in my judgment, now has the power under the board remedial provisions of the Act to impose appropriate remedies, and it would serve a salutary purpose to do so. I would urge that mutuality of enforcement requires that wherever the employee is prevented from working and earning wages whether by reason of union unfair labor practices or employer unfair labor practices, he be made whole. I am thinking of the situation where the employee wants to work; he is capable of working; but is unable to do so because of violence, or unfair recognition picketing, or secondary boycotts, or jurisdictional disputes, or strikes against a certification of another union. These are cases where an employee is coerced into respecting a picket line; or, if he has the temerity to cross a picket line to go to work, "he changes his mind" because of unlawful threats or for violating union rules.

These rights are statutory rights of employees "to refrain from engaging in union activity." The "right to refrain from union activity" should be protected as much as the right to engage in union activity. The one right is coordinate with the other, and when they are violated by either unions or employers, the employee should be compensated for any loss of wages earned by reason of the unfair labor practices of either. Evenhanded treatment brooks no disparity.

Pre-emption

Former Congressman Hartley, a co-sponsor of the Taft-Hartley Law has stated[111] that, while court decisions as developed in *Garner*[112] and *Garmon*[113] had withdrawn state control over union activities, Congress "had not the slightest intention of depriving the states and state courts of their traditional functions of protecting the rights of their citizens;" that nothing in the Act gave the Board "exclusive jurisdiction" to deal with unlawful union conduct. I would like to amplify this somewhat. Judicial discovery of preemption has summarily declared invalid state laws regulating union activity, and increased the power of organized labor. I would illustrate the force of pre-emption in two cases in Missouri—one *before* federal pre-emption and one *after*. Each case involved substantially the same union conduct and the same state statute. In the case decided before pre-emption, *Giboney v. Empire Storage & Ice Co.*[114] the United States Supreme Court held that Missouri anti-trust laws applied to it. It said that unions did not have a "peculiar immunity from trade restraint combi-

111. Statement before the Subcommittee on Separation of Powers, Committee on the Judiciary of the United States Senate, March 26, 1968.
112. Garner v. Teamsters, Chauffers and Helpers Local Union No. 776, 346 U.S. 485 (1953).
113. San Diego Bldg. Traders Council v. Garmon, 359 U.S. 236 (1959).
114. 336 U.S. 490 (1949).

nations." In finding a union boycott illegal, it declared that to "exalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy. . . ."[115] Six years later, in *Weber v. Anheuser Busch*,[116] *after* pre-emption, the Court held that the same type of union conduct was no longer subject to restraint, and a union boycott could be conducted in disregard of state laws. Thus unions have achieved that "peculiar immunity" from laws that bind all other citizens. Plainly, in the light of pre-emption, the Board should be especially vigilant to carry out the will of Congress.

CONCLUSION

As I stated at the outset, there is growing disenchantment with the concept of free collective bargaining. Strikes have not diminished; they have increased. The question has been raised whether the Board has carried out congressional intent. I submit that it has not, and that a cause of growing labor strife and settlements against the public interest may be found by examining labor decisions as a point of departure. It may be concluded that there must be a restructuring of our labor statutes to re-establish equality in the labor-management equation, which has been maladjusted through decisions weighing heavily on the side of organized labor. Equality in bargaining must be re-established as a prerequisite for both rational solutions and industrial relations stability. It may also be concluded that our labor statutes, distorted by administrative and judicial interpretation, must be given a chance to work as Congress originally intended. Experts are struggling to find a satisfactory solution to the problem of increasing industrial strife and strikes against the public interest. Some observers believe that the right to strike is outmoded in today's society and that we must revise our traditional thinking that strikes are a necessary part of a free economy. They question whether the right to strike is so sanctified as to jeopardize the interest of others.[117]

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115. *Id.* at 497.
116. 348 U.S. 468 (1955).
117. An outstanding authority has said:
> Can we really expect the affected publics to be persuaded that government intervention will jeopardize a bulwark of democracy, when relatively small numbers of private groups are able to jeopardize, seemingly at will, bulwarks of the economy? Is it not as reasonable that they should conclude that there is something wrong with the very procedures whose sanctity is being protested by those who ask 'hands off'?

Chamberlain, *Strikes in Contemporary Context*, IND. & LAB. REL. REV., Vol. 20, No. 4 (1967).

There are those, on the other hand, who reject solutions such as compulsory arbitration or mediation to a finality or any other procedure which would impose a government dictated bargain on the parties as being but the prelude to the future dictation of other aspects of our industrial economy.

These proposals, I believe, miss the mark; for they deal with the effects, not the cause, of potential labor disputes. Nor do they purport to reach the overwhelming majority of strikes which are not of a national emergency character but which nevertheless deeply affect the local interests of the community. The real answer lies, in my judgment, in a restoration of the balance. Equality in bargaining power must be re-established as a prerequisite for both rational solutions and stability in industrial relations. Legislation to restore balanced rights once accomplished would not only ameliorate disputes of a national character but would apply as well to disputes of local public interest, while at the same time reinforcing the principle of voluntarism. If this is done, free collective bargaining, now under severe attack, would once more be honored as the keystone of our national labor policy. Neither organized labor nor management should object to a restoration of the balance. For a free society would protest the imposition of governmental controls. But a free society also has the right to expect and receive solutions in the public interest.

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